Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-956

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN BENJAMIN CLOPTON, JR.
Petitioner,

V.

CITY OF DALLAS
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I.

SUMMARY OF REPLY ARGUMENT

The City argues that the district court and the court of appeals properly applied the rule established by this court in United States Postal Service Board of Governors, v. Aikens, 460 U.S. 711 (1983) because Clopton failed to present direct evidence that the City acted with a discriminatory motivation in rejecting him for promotion to zoning inspector supervisor 13. Such a contention is without merit. Clopton did present such evidence.

II.

LOWER COURT ERROR

Clopton submits that the district court and the court of appeals ignored the direct evidence of discrimination presented by Clopton. The City does also.

The district court did find that race was a factor in the selection of Jones. The district court found, however, that Clopton suffered no discrimination because Jones was not selected until after Clopton's rejection. The evidence showed that the City deprived Clopton of the same promotional opportunities as it afforded Noble Jones, not before Clopton was rejected by the committee, but after, during the period from November 21, 1973 through April 24, 1974. 1/ During this period Jones was given the benefit of on the job training and several opportunities to qualify for promotion. Clopton, on the other hand, was summarily rejected, and

1/ During this period, the City took a black, unqualified, marginal, non-applicant employee; made him a qualified applicant and promoted him on a non-competitive basis, all without an affirmative action plan or history of discrimination against blacks. (CR 290; R 112-113).

not given any further opportunity to qualify and be reconsidered for the April 24, 1974 vacancy, because this position was filled in secret.

The evidence as summarized by the City in its brief shows only that Clopton was rejected by the screening committee in connection with the filling of the five positions on November 21, 1973.

Clopton, proved that the certificate of eligibles he was placed on as a result of his successful October, 1973 qualifying examination, continued in effect for one year. (R 204, 213). He remained an eligible candidate for promotion.

Clopton also proved that Richard Wilson, and not the committee, selected Noble Jones for the ZIS-13 position on April 24, 1974.

III.

DIRECT EVIDENCE

The direct evidence of discrimination presented by Clopton is as follows:

Evidence that the Department set-out to recruit minorities, because none were on the certificate of eligiblity. See page 8 of Petitioner's Opening Brief. 2/

The following direct testimony of J. Thomas Jones, Jr., the City official responsible for overall hiring within the Department in 1973:

> Q. Mr. Jones, I want to call your attention back to the year 1973-1974 and ask you what title you had at that time. Where were you employed at that time?

2/ The fact that no minorities were certified by the Board would be of no significance unless the department was seeking minorities. This alone reflects racial preference. To say that the City sought to recruit minorities, yet when it promoted Jones, race was not a factor, defies reason.

A. I was employed by the City of Dallas as the manager administrator of the building inspection division.

Q. Who did you report to?

A. At that time?

Q. 1973-1974, yes.

A. I believe it was Mr. Richard Wilson.

Q. What title did he have?

A. He was the director of the department.

Q. The Department of Housing and Urban Rehabilitation?

A. Yes.

Q. Now, calling your attention back to the Noble Jones situation, what is your recollection of when Mr. Jones came into the department - - into the zoning division?

* * *

A. The best I can recall there is that Mr. Wilson promoted him to the job.

Q. From what department?

A. Well, he's in the same department if I recall. It was just in another division.

Q. Do you know why Mr. Jones promoted him to that position I'm sorry. Mr. Wilson.

A. I'm under the impression that it was during that time that we had the beginning phases of an affirmative action program.

Q. And that's why he did it?

A. Yes Sir. (R 101-103).

The following testimony was given by one of the City's key witnesses:

Q. What is your name?

A. Jerry Batts.

Q. In what position were you in 1973?

A. Technical and Research Co-ordinator.

Q. And so you are saying then that you plugged Mr. Noble Jones into that position?

A. No, sir, Mr. Dick Wilson did that by himself without consulting any member of the committee to my knowledge. 3/

Q. Do you know anything about Mr. Jones' qualifications?

> A. Mr. Jones was a 12 in the - in another department. Mr. Wilson moved him over to plug 15. Subsequently, Mr. Jones took the 13 test and passed it. (R 221-222).

Following his placement in the CZI-15 position on November 21, 1973, Jones was allowed to take the ZIS-13 position qualification examination on a noncompetitive basis, on two occasions until he passed the examination. (R 147-148). Clopton was not afforded this same opportunity.

The City argues that Jones possessed superior qualifications. The City fails to note the following:

Clopton met the stated qualifications for the ZIS-13 position on April on April 24, 1974. (PX 4; PX 2; R 37-45). Jones did not. Jones admitted that prior to April 1, 1970, he had no work exper-

ience with building construction codes (R 140); no prior experience enforcing the zoning code (R 150); no prior experience enforcing the sign code (R 151); no prior experience reviewing construction plans and specifications (R 150-151). These were all stated requirements. (PX 4).

Jones' educational background was in Music. Clopton's was in Civil Engineering. (R 4). Jones' employment history was in beer sales for ten years and life insurance sales for three years. (R 134, 136). Clopton's was in construction. The only supervisory experience possessed by Jones was supervising insurance agents for one year. (R 134,138). Clopton had been a construction crew foreman and had trained

3/ Richard (Dick) Wilson did not testify. Mr. Batts was a member of the committee. (R 216-217). See also testimony of the EEOC Investigator (R 14-15).

new zoning inspectors in the department for several years. (R 44-45).

As of April 24, 1974, Clopton had an outstanding job performance record with the City. (PX 8). Jones did not. Jones admitted that in 1972 he was suspended for 5 days for violation of City work rules. (R 162). Jones admitted that in 1972 he had received an unsatisfactory performance evaluation criticized for conducting personal business on City time. (R 155-56). 4/

The claim tried by Clopton as framed in the Pre-Trial Order entered by the district court is that he was denied a promotion to ZIS-13 because of his race on either November 21, 1973 or April 24, 1974. (CR 27).

To argue, as the City apparently does, that Clopton was properly denied the

April 24, 1974 position because he had been previously rejected by the screening committee, proves discrimination as a matter of law when the circumstances under which Jones was awarded the position are taken into consideration.

IV.

CONCLUSION

In light of the direct evidence that discrimination on the basis of race did play a direct role in Clopton's rejection for the April 24, 1974 vacancy, it was encumbent upon the City to prove by a preponderance of the evidence that Clopton would have been rejected in the absence of the said preferance afforded Noble Jones.

4/ It defies common practice for an employer to go to such extremes to promote an employee with such an employment history, if job qualification was the motivating factor, particularly where it had 16 certified white applicants.

Respectfully submitted,

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